Supreme Court, U.S.
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85-1143

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

NO.

ALFRED O. WALLACE,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE

I, being a member of the Bar of this Court, certify that on this 13th day of December, 1985, three copies of the petition for writ of certiorari were mailed, postage prepaid to Michael T. Paul, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C. 205030, The Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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QUESTIONS PRESENTED

1. Whether or not the presiding official's decision was based upon an erroneous application of statute or regulation, whether the presiding official correctly applied the law to facts, and whether the decision of the presiding official was based on credible testimony of witnesses?

2. Whether it is within the accepted and usual course of judicial proceedings for an appeals court to virtually mandate that all determinations made by a hearing officer (presiding official) as to facts and credibility of witnessess be affirmed?

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IN THE
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NO.

ALFRED O. WALLACE,

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DEPARTMENT OF THE ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, Alfred O. Wallace, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on October 16, 1985.

OPINION BELOW

The opinion for the court of Appeals for the Federal Circuit, not yet reported, appears in the Appendix hereto. The order of the Merit Systems Protections Board appears in the Appendix also.

JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was decided on October 16, 1985. A petition for rehearing was not filed and rehearing en banc was not sought or asked for. This petition for writ of certiorari was filed within sixty (60) days from the date of the decision. This court's jurisdiction is invoked under 28 USC 1254 (1).

STATUTORY PROVISIONS INVOLVED

5 USC § 7701 (c) (1) (B):

> Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision-

(B) in any other case, is support by a preponderance of the evidence.

5 USC § 7703 (c) (1) (2) (3):

In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings or conclusions found to be

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence.

STATEMENT OF THE CASE

The intial action was brought pursuant to 5 USC § 7512 by the respondent agency, Department of the Army, Corps of Engineers, against Alfred O. Wallace, petitioner, an employee of said agency as defined by

5 USC § 7511(a)(1)(A) alleging that the Petitioner assaulted his immediate supervisor at the agency, Wolf Creek Dam, Russell County, Kentucky, thereby justifying the removal of petitioner from employment with the respondent agency. The petitioner was, in fact, involved in a scuffle with a fellow employee approximately 15 to 30 minutes after work time at the above site, on a public parking lot. The petitioner's attempt to obtain a hearing for a presentation of facts and arguments before the Merit Systems Protection Board in relation to removal was denied. Upon appeal to the United States Court of Appeals for the Federal Circuit it was remanded (No. 83-1425) ordering that the petitioner be granted a hearing. The case was then heard by the Merit System Protection Board on May 1-2, 1984.

A decision was rendered for the respondent by the Board and a petition for review was denied. The petitioner appealed to the United States Court of Appeals for the Federal Circuit alleging that the decision of the Merit Systems Protection Board was incorrect, inasmuch as the decision was based on an

erroneous interpretation of statute or regulation and was not based upon credible testimony of witnesses. It was also alleged that it based upon an incorrect application of the law to the facts.

The scuffle complained of by the agency happened some 30 minutes after work time, wherein the petitioner was having a conversation with a fellow employee that also worked for the Department of the Army. A scuffle ensued; no one saw it except the petitioner and the person involved. The incident resulted in the dismissal of the petitioner. It should also be noted that after an extensive effort by the supervision of the agency, a criminal warrant was issued for the petitioner. The case was tried and resulted in a dismissal of all charges, by the prosecution. It appears from the record that the supervision was zealous in getting petitioner, Wallace, fired.

The credibility of the witnesses which are produced on behalf of the agency and were heard by the hearing officer was appalling. This can only be determined by reading the record. I would urge the

Court to read the transcript of the testimony of the people involved which is in the record. The person who was in the scuffle with Wallace, the petitioner, was not hurt and only went to the doctor after encouragement from the supervision in order to make a record and attempt to make a case against Wallace, the petitioner.

The record will show that the petitioner had filed grievances against the supervision prior to this scuffle and that he was not treated as other employees were treated on this particular job.

REASONS FOR GRANTING THE WRIT

1. THE PRESIDING OFFICIAL'S DECISION WAS NOT BASED UPON CREDIBLE TESTIMONY OF WITNESSES, WAS BASED UPON AN INCORRECT APPLICATION OF THE LAW TO THE FACTS.

First, it should be noted by this court that the presiding official's opinion did not properly apply the law to the facts and was not based upon credible testimony, the United States Supreme Court has held previously in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 as follows:

> "While the findings of the National Labor Relations Board are entitled to respect, they must, nonetheless, be set aside when the record before a Court of Appeals clearly precludes the board's decision from being justified by fair estimate of the worth of the testimony of witnesses or by it's informed judgment on matters within it's special confidence or by both."

For the presiding officer in this case to enter an opinion setting forth facts that are clearly erroneous, the majority of those relating to the reliance on testimony by the other person involved in the scuffle, would be a clear abuse of discretion by the presiding official. This case boils down to an altercation between two (2) employees of the U.S. Army, Corp of Engineers of the Wolf Creek Dam facility "after hours." The U.S. Army, Corp of Engineers through their employees and supervisors indicated that Wallace was dismissed because he was in a fight with a fellow employee.

However, it should be specifically noted by this Honorable Court that this altercaltion took place "after hours." The work day had ended and both parties had completed their duties at the U.S.

Army, Corp of Engineers. The presiding official gave credence to the testimony of a fellow employee even though at the hearing of this action the fellow employee admitted that he had taken government property home with him and he had been a subject of an investigation as a result of taking government equipment home with him.

The presiding official, in her findings, gave overwhelming weight to the testimony of fellow employee in regard to the facts of the altercation with Wallace. This altercation that took place between the petitioner, Wallace, and fellow employee was one where no witnesses were present, other than the two individuals and any reports that were made as to either the initiation of contact by one or the other would be solely a determination of the credibility of the individual.

However, the presiding official failed to take into account the several instances of grievances and union activities in which the petitioner, Wallace, had engaged.

The United States Supreme Court ruled in Great Northern Railway Co. v. Weeks, 297 U.S. 135, 56 S. Ct 426, 80 L. Ed. 532 as follows:

> "Where it clearly appears that an assessing board failed to give reasonable weight to certain evidence, and the board persistently disregarded nonconditions essential to the jus assertainment of value, the assessment is arbitrary and may be relieved against."

It was apparent that no weight whatsoever was given to any witnesses who testified for the petitioner, all of which were overwhelming evidence that the supervision was out to get Wallace in any way possible and see that he no longer work for the U.S. Army Corp of Engineers. The decision affirming Wallace's removal did not comply with the statutes set forth in 5 USC § 7703(c)(1)(2)(3).

This Honorable Court should take into consideration the fact that the petitioner, Wallace, and the fellow employee were "off duty" at the time the altercation took place. See Phillips v. Bergland, 586 F. 2d 1007 (1978) (4th Cir.) There was simply no showing that there was misconduct on the part of the petitioner and, that if there was

misconduct, that it was severe enough to form a basis for removal. There must be a showing that the misconduct affected employee's performance on his job. Brancadora v. Federal National Mortgage Association, 344 F. 2d 933 (9th Cir.) (1975)

It is obvious that only one employee is affected by the action of the Merit Systems Protection Board and the United States Court of Appeals for the Federal Circuit, but his rights are valuable and he, in effect, will never be able to get employment by reason of the black marks that have been left on him by the U.S. Army.

2. THE DECISION RAISES SIGNIFICANT PROBLEMS CONCERNING DETERMINATIONS MADE BY HEARING OFFICERS AND WHETHER THEY CAN BE OVERTURNED.

The decision and reasoning of the U.S. Court of Appeals for the Federal Circuit is incorrect and improper inasmuch as that decision follows the virtually mandatory practice in that court of affirming the findings of fact and determinations of credibility as made by an hearing officer. This procedure, in effect, gives practically nonreversible, absolute discretionary power to the

hearing officer. Clearly, such a practice should not be within the accepted and usual course of judicial proceedings.

The Court stated that the petitioner had shown no convincing reason to reject the principal that a determination as to credibility of witnesses should rest within the discretion of the presiding official. Petitioner states that the record discloses that the CREDIBILITY [emphasis ours] of the witnesses produced by the respondent agency was seriously questionable. However, the testimony of such witnesses was the determining factor in the decision in this case.

Petitioner further contends that as a result of the credibility given and the undue reliance placed upon the testimony of respondent agency supervisor, the decision of the presiding official constituted an abuse of discretion. Universal Camera Corp. v. National Labor Relations Board, supra.

The Petitioner did not argue with the accepted principle that wide discretion should be given a presiding official in making a determination as to

facts and credibility of witnesses. However, the tradition of the lower court in granting practically absolute, nonreversible discretionary power to presiding official in making such determinations that is not within the accepted and usual course of judicial proceedings.

To allow a hearing officer to exercise such plenary power is, in effect, tanamount to estoppel of an appeal based on such determinations made by the presiding official. The carte blanche application given to determinations made by an hearing officer as to facts and credibility of witnesses is an approach which should not be tolerated. It was stated by one of the judges at the court of appeals level during the oral argument that he had seen a thousand cases and none had ever been reversed on the findings of fact by the hearing officer. If this be the fact, then all appeals should be stopped after the administrative law judge makes his findings of fact or it should be determined and should be handed down by this court that it should be set out plainly that whatever the

hearing officer findings are, this is all there is going to be and you might as well not appeal from it. This practice is open to serious question and the refusal of the Federal Circuit Court of Appeals to inquire into the facts and the worth of the testimony of the witnesses is wrong and should not be justified.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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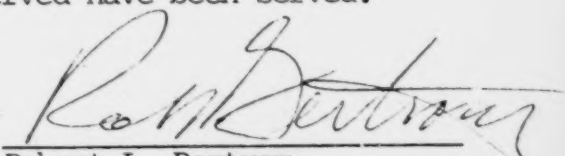
Date: December 12, 1985

CERTIFICATE

I, being a member of the Bar of this Court, certify that on this 13th day of December, 1985, three copies of the petition for writ of certiorari were mailed, postage prepaid to Michael T. Paul, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C. 205030, The Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.



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APPENDIX

NOTE: This opinion will not published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ALFRED O. WALLACE,	)	
	)	
Petitioner,	)	Appeal No. 85-2062
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY,	)	
	)	
Respondent.	)	

DECIDED: October 16, 1985

Before FRIEDMAN and DAVID, Circuit Judges, and COWEN, Senior Circuit Judge.

PER CURIAM.

DECISION

Alfred O. Wallace appeals from the decision of the Merit Systems Protection Board (MSPB or Board), Docket No. AT07528310266, affirming his removal from the Department of the Army, Corps of Engineers (agency), based on a charge of striking and inflicting bodily injury on a fellow employee. We affirm.

OPINION[1]

Petitioner primarily challenges the decision of the presiding official on the ground that too much weight was given to the testimony of his supervisor, the other employee involved in the altercation. As we have frequently held, the determination of the credibility of witnesses rests within the discretion of the presiding official. Petitioner has shown no convincing reason for this court to reject that determination in this case. See DeSarno v. Department of Commerce, 761 F.2d 657, 661 (Fed. Cir. 1985); Griessenauer v. Department of Energy, 754 F.2d 361, 364 (Fed. Cir. 1985).

1. In his appeal to this court petitioner included a claim of handicap discrimination. However, on June 27, 1985, petitioner signed a statement which was thereafter filed with the Clerk, in which he abandoned the discrimination claim. Consequently, this court has jurisdiction to decide the remaining issues in his appeal.

credibility of witnesses rests within the discretion of the presiding official. Petitioner has shown no convincing reason for this court to reject that determination in this case. See DeSarno v. Department of Commerce, 761 F.2d 657, 661 (Fed. Cir. 1985); Griessenauer v. Department of Energy, 754 F.2d 361, 364 (Fed. Cir. 1985).

II.

Petitioner also argues that the presiding official failed to give proper consideration to his defense that his removal was a reprisal for his participation in union activities. However, we find that the presiding official gave proper consideration to petitioner's defense and found that there was causal connection between petitioner's protected activity and the adverse action proposed against him. We agree with the presiding official that petitioner failed to carry his burden on this issue.

III.

Petitioner's third argument is that the presiding official erred in sustaining his removal, because the misconduct with which he was charged occurred while he was not on duty. Therefore, he contends that the efficiency of the service was not hampered by his off-duty conduct. However, the presiding official found that although the altercation occurred when petitioner and his supervisor were off duty, it took place in a Government parking lot shortly after their shifts had ended. The presiding official also found that the incident was work-related, since it involved the striking and injuring of petitioner's supervisor because of a disagreement over a work-related matter. We agree that the evidence supports the conclusion that there was a nexus between the petitioner's conduct and the efficiency of the service. Where the misconduct of the employee is work-related, it is proper to presume that a nexus exists. See Staton v. United States, 228 Cr. Cl. 797, 804 (1981).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:	
ALFRED O. WALLACE, Appellant,	DECISION NUMBER AT07528310266
v.	
DEPARTMENT OF THE ARMY, Agency,	Date July 11, 1984

INTRODUCTION

On December 15, 1982, Alfred O. Wallace (appellant) appealed the decision of the Department of the Army, Corps of Engineers, Nashville, Tennessee (agency), removing him from the position of Power Plant Mechanic effective November 23, 1982. This decision is based upon written submissions of the parties as well as testimony and evidence presented at a

hearing conducted on May 1-2, 1984, in Nashville, Tennessee.[1]

JURISDICTION

Pursuant to 5 U.S.C. § 1205(a)(1), the Board has authority to hear and decide all matters within its appellate jurisdiction, as conferred by law, rule or regulation. At the time the agency action became effective, appellant was an employee as defined by 5 U.S.C. § 7511 (a)(1)(A). The action taken by the agency was initiated pursuant to 5 U.S.C. § 7512. Therefore, this appeal is within the Board's jurisdiction. 5 U.S.C. § 7513(d).

---

[1]A previous decision, dated February 8, 1983, was issued by a presiding official of the Atlanta Regional Office dismissing the appeal as untimely filed. That decision was appealed to the Board, but was denied based on a determination that the petition for review did not meet the criteria under 5 C.F.R. § 1201.115. That determination was appealed to the United States Court of Appeals for the Federal Circuit where it was found that the appeals should have been considered timely filed. It was accordingly remanded for a hearing on the merits and was assigned to the undersigned presiding official for adjudication.

ANALYSIS OF EVIDENCE AND FINDINGS OF FACT

Appellant's removal was based on the agency's allegation that he was absent without official leave (AWOL) for five hours on October 27 and eight hours on October 28, 1982. The agency's decision to remove appellant was also based on a charge of striking and inflicting bodily injury upon a fellow employee.

Regarding the charge of AWOL, Howard Boatman, Chief of the Operations Division for the agency and deciding official in this case, testified that annual leave is granted in the discretion of supervisors and consideration is given to the workload at the power plant. He stated that on the dates appellant was charged with AWOL there was a heavy maintenance workload. He also noted the agency has a particular policy in such instances. (See agency response, tab 12a). that policy states that during periods of heavy maintenance, such as annual inspections or emergency repairs, all leave is to be

approved by the superintendent. The record further indicates that appellant received and read a copy of that policy on February 8, 1982. Mr. Boatman also testified that at the time appellant was absent there was a maintenance workload. During his testimony he acknowledged that appellant's immediate supervisor, Marshall Coffey, had been allowed to take leave on October 28 because the work had been finished. He added, however, that appellant was needed that day as a crane operator and someone else had to be located to do the work.

Charles Grider, Superintendent of the Wolf Creek Power Plant where appellant was employed, also testified at the hearing. he stated that he made the determination that appellant be considered AWOL on October 27-28. He also noted that on October 25 appellant had requested annual leave for October 27-28, but that request was denied. He added that it was a period of heavy maintenance and appellant was needed as a crane operator. He states on on October 27 appellant told Mr. Coffey that he was

feeling sick and might have to go home. Mr. Grider stated that he told Mr. Coffey another crane operator could be used. Mr. Grider further noted that appellant left the work site around 9:00 a.m. that day. The record indicates appellant was also absent on October 28. Mr. Grider stated that on October 28 he told the timekeeper to allow the appellant to take whatever sick leave he had available for both days and tentatively place him on leave without pay for the remainder of the absence. Mr. Grider also noted that Mr. Coffey did not have the status to approve annual leave that week due to the major maintenance.

Mr. Grider also testified that appellant returned to work on Friday, October 29 and told the timekeeper he wanted to take annual leave for his absence instead of leave without pay (LWOP). Mr. Grider added that appellant discussed the matter with him several times that day, and Mr. Grider told appellant that if he did not sign a leave form for LWOP it would be changed to AWOL. Mr. Grider did ac-

knowledge, however, that he received a doctor's statement from appellant which indicated that appellant had seen a doctor on October 27 and "was too sick to work." A copy of the statement is included in the record. It also states that appellant's physician advised him that he probably should not work on October 28. Under cross-examination, Mr. Grider also acknowledged that the major maintenance was completed on October 27 and other employees were granted annual leave on October 28. His only explanation regarding his failure to grant appellant annual leave was that appellant had no sick leave balance and annual leave could not be granted in such a circumstance unless requested in advance. He also noted appellant did not have sufficient annual leave to cover those two days.

Mr. Coffey, Power Plant Senior Mechanic and appellant's immediate supervisor, testified regarding appellant's leave request. He stated that he can approve annual leave except during periods of heavy maintenance. He also noted that he can authorize

sick leave. He explained that on October 27 appellant told him he was sick and had to leave and he told him that was fine and he should go home if he was sick. He noted that appellant said he would have to take annual leave since he did not have sufficient sick leave. Mr. Coffey stated that he responded "we'll have to work out the leave."

Appellant testified that when he informed Mr. Coffey on October 27 that he felt sick and might not be able to remain at work all day Mr. Coffey told him that was all right. He added that later that morning appellant mentioned to Mr. Coffey that he did not have enough sick leave and would have to take annual leave. He stated that Mr. Coffey responded that it would be fine if that is what he had to do. Appellant also noted that Mr. Coffey had granted his annual leave requests previously and was his immediate supervisor. he also testified that he was instructed to get his leave approved by Mr. Coffey, Mr. Grider or Mr. Brown even though there was a policy to have annual leave approved by the

superintendent during periods of heavy maintenance.[2]

In evaluating the evidence regarding the AWOL charge, I note that Mr. Grider's testimony was somewhat inconsistent regarding why appellant was charged with AWOL. At one point he indicated that the annual leave request was denied because appellant did not request it in advance, but appellant's advance request had been denied. Mr. Grider also acknowledged that the heavy maintenance was completed on October 27 and other employees were allowed to take leave on the subsequent day. In addition, I note that he told Mr. Coffey another crane operator could be made available. Thus, the need for appellant's presence seems to have been less urgent that the agency claims.

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[2]Appellant also complained that he was required to bring in a doctor's statement regardless of the length of sick leave, while other employees were required to do so only when they were absent more than three days. Nevertheless, I do not find that fact indicative of any different treatment of the appellant in light of the fact that he had been reprimanded previously for AWOL.

I further note that appellant understood that Mr. Coffey had granted him leave for his illness. Even though Mr. Coffey may not have had the authority to grant annual leave on October 27 due to the heavy maintenance, it appeals he would have had that authority on October 28 when the workload was finished. In any event, he would have had the authority to grant sick leave. By Mr. Coffey's own admission he stated he told appellant that they would work out the leave and permitted appellant to go home. In light of the fact that Mr. Coffey was appellant's immediate supervisor, I find appellant's reliance on the permission to leave to be sufficient to excuse his absence. Moreover, there is no dispute that appellant was sick on October 27-28. Here, appellant has provided a legitimate reason for his absence and the agency has failed to show that it was not valid. Thus, the facts here are comparable to those presented in Hockman v. American Battle Monuments Commission, 11 MSPB 246 (1982). In Hockman, the Board stated that where appellant submitted a valid reason, it was incumbent on the

agency to show that the reason offered was not bona fide. Since the agency did not do so, a waiver of the leave requirements was found warranted. Based on the foregoing reasons, I find that the agency has not supported its charge of AWOL by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). Accordingly, the charge of AWOL alleged by the agency is not sustained.

Mr. Coffey testified regarding the charges of striking and inflicting bodily injury on a fellow employee. He stated that on October 29 he was in the office, with Mr. Grider and Henrietta Leveridge, at approximately 3:15 p.m. to discuss something when appellant entered. He added that appellant told him to tell Mr. Grider and Ms. Leveridge that he had actually approved appellant's annual leave request. Mr. Coffey, however, told them he had not. Mr. Coffey testified that subsequently he left the office and went into the parking lot. He stated that appellant approached him and wanted to discuss leave matters again and accused Mr. Coffey of lying

to him. Mr. Coffey noted that they discussed the matter for awhile, Mr. Coffey walked toward his truck, and they continued their discussion. Mr. Coffey added that as he turned to get into his truck appellant grabbed him, holding his forearm around Mr. Coffey's neck and choking him. Mr. Coffey stated that he reached into the back of the truck and found a stick of wood approximately three inches in diameter and 16 inches long. he said that appellant was choking and beating him and pulling his hair at the time. He added that he tried to call for help but could not. Mr. Coffey stated that then he said to appellant, "let's talk," and appellant responded he would if Mr. Coffey put down the piece of wood. He stated that he put the wood down and appellant stopped holding him.

Mr. Coffey further testified that then he went into the control room and rested. He stated he was nervous and hurt. He noted he was worried about his neck because he had had surgery on it previously. He added that one arm was numb and hurting. He

stated he then went to a hospital to have x-rays made. A copy of the emergency room report is included in the record and indicates that Mr. Coffey received outpatient treatment on October 29 for head contusions, neck abrasions, cuts, bruises and stains. He was provided a soft cervical collar for his neck and given two medications, apparently for pain.

Mr. Coffey also testified that in supervising appellant they had to work closely together due to the work involved and appellant was required to take directions from Mr. Coffey. he added that due to the October 29 incident he did not have confidence in appellant, and noted that he could not trust him and would to keep "a guard up." He also stated that he had seen appellant throw his hard hat and slam doors when he was upset, and he appeared to get more upset than most people. He added that appellant operated dangerous equipment and cranes as part of his job.

Appellant testified that he say mr. Coffey in Mr. Grider's office the afternoon of October 29 and asked Mr. Coffey to tell Mr. Grider that he had approved the leave for him, but Mr. Coffey denied it had been granted. Appellant further testified that he left the office and went to his car to wait for Mr. Coffey to talk to him again. He noted that on the way he saw Phillip Herrin, another employee, who asked him why he had "that look in his eye." Appellant testified that he responded: "Because it belongs there." He stated that in the parking lot Mr. Coffey walked up to him, they talked further about his leave and Mr. Coffey again denied he had approved it. He stated that when Mr. Coffey walked to his truck to put something in it and then walked back toward appellant. Appellant testified that he told Mr. Coffey that he (Mr. Coffey) was afraid of "supervision" and that he had lied about the leave. He added that Mr. Coffey then explained that he had to work there, appellant responded "I do too," and Mr. Coffey said "not for long." He stated that Mr. Coffey then swung at him but missed. Appellant

added that he blocked Mr. Coffey's punch, hit him twice on the side of his head, and pushed him up against his truck while trying to hold him. He stated that then Mr. Coffey hit him with piece of wood and appellant wrestled with him and was able to hold him from behind, putting his arm around Mr. Coffey's neck. he added that Mr. Coffey bit him on the hand and appellant jerked Mr. Coffey's neck and hit his left cheek. Appellant testified that Mr. Coffey told him to let him go and appellant agreed to do so if he would drop the stick. At that time Mr. Coffey dropped the stick and appellant released him. Appellant also testified that he saw Mr. Coffey go back into the power house by himself.

Mr. Herrin testified at the hearing that he saw appellant at approximately 3:30 p.m. on October 29 and asked appellant: "Why do you have an upset look in your eye?" He stated that appellant responded: ³That's where it belongs." Mr. Herrin further testified that appellant said he was going outside to wait for Marshall Coffey and he noted appellant

was upset. He stated that later he heard Mr. Grider Ms. Leveridge state that they needed to go outside. He added that when they returned they were assisting Mr. Coffey and his arms were around their shoulders.

Mr. Grider testified that appellant came to his office several times on October 29 and seemed angry. Mr. Grider testified that appellant left his office around 3:30 p.m. on that day and went to Ms. Leveridge's office where Mr. Coffey was. He noted that there as a loud discussion, by he only remembered appellant, and not Mr. Coffey, talking in a loud voice. he stated he later saw appellant and Mr. Coffey talking in the parking lot. He added that then Ms. Leveridge came and got him because she thought there might be trouble. He added that Mr. Coffey's shirt, collar and pockets and were torn, he was a mess and his cheek was bruised. He said Mr. Coffey complained he could not breathe and he had lumps on his head. He added that he drove Mr. Coffey to the hospital and noted that the lumps and bruises were still visible the following Monday,

three days later. Mr. Grider also testified that appellant and Mr. Coffey need to work well together since they were the only two employees in the machine shop and Mr. Coffey assigned tasks to appellant.

Ms. Leveridge testified that on October 29 she saw appellant and Mr. Coffey in her office that afternoon. She noted that during their conversation appellant looked upset. She stated that she later observed them in the parking lot and at one point Mr. Coffey appeared to be leaning or slumping on a car. She added that she and Mr. Grider then went outside and Mr. Coffey headed toward the plant. She also noted that appellant got into his car and drove away. She added that Mr. Coffey's shirt was open and torn in several places and the pocket was torn from it. Ms. Leveridge also testified that lying on the ground beside Mr. Coffey's truck were Mr. Coffey's cigarettes, comb, pen and paper.

Appellant also presented evidence of his claim that the real motivation behind the agency's action was his prior union activity. That evidence is being discussed here since appellant also offered it to show that Mr. Coffey felt animosity toward appellant and that appellant and Mr. Coffey did not get along. Mr. Grider stated that appellant had filed grievances against him at another plant during 1979. He noted that appellant had also complained that Mr. Coffey had made derogatory comments about him in a log book. He added that appellant had asked to be transferred several times because he and Mr. Coffey did not get along well.

Mr. Coffey stated that appellant had filed grievances against him also, but added they were at Laurel, another plant where Mr. Coffey worked during 1976-1981. He noted that one grievance involved written derogatory comments he made about appellant due to the grievance the remarks were not placed in his personnel file. He also had complained about working through the lunch hour without

a break but he did not think a grievance was filed. Marvin Antle, an agency employee, testified that Mr. Coffey required appellant to go to his office frequently to question him about something.

Carlon Brown, superintendant at the Laurel Plant where appellant worked prior to his employment at the Wolf Creek Plant where the incident occurred, testified that appellant filed three grievances at Laurel. He added that they were directed against himself, Mr. Coffey and Mr. Grider. Henry York, an employee at Laurel when appellant and Mr. Coffey worked there, testified that the grievances filed by appellant at Laurel were filed in 1978 and 1979. He noted that although Mr. Coffey was appellant's immediate supervisor, he was not considered to be part of "supervision" during that period. Another employee, Jack Clayton, worked at both Wolf Creek and Laurel Plants. He stated that Mr. Coffey "picked on" appellant and once told him to make sure appellant worked, but that he was only a maintenance worker and could not tell appellant what to do.

Appellant testified that he had filed grievances at the Laurel Plant. He added that had complained at Wolf Creek during the week before the incident involved here about not getting his breaks and lunch hour on time, but his complaint was not a grievance.

In evaluation the charge of striking and inflicting bodily injury on a fellow employee, I note that the record in undisputed that there was animosity between appellant and Mr. Coffey. I do not; however, find that grievances filed several years previously or a complaint registered during the preceding week provoked Mr. Coffey to initiate a fight. They are too remote in time. The record does contain evidence, however, that appellant was angry with Mr. Coffey that day. He had complained repeatedly to Mr. Grider and accused Mr. Coffey of lying. In addition, the record shows that he spoke in a loud voice to Mr. Coffey that afternoon, looked upset, and, by his own admission, when to the parking lot to wait for him. I find that the facts indicate that appellant initiated the fighting incident. In

that regard, I note that Mr. Coffey received the brunt of the blows even though he was armed with a large stick. Although appellant alleges Mr. Coffey hit him with the stick, the evidence does indicate he was injured. In addition, appellant admitted striking Mr. Coffey who was clearly injured as a result of the altercation. I also note that appellant stated that he saw Mr. Coffey walk into the power house by himself while Ms. Leveridge, who I found to be very credible, state that she and Mr. Grider assisted him inside. I also note that appellant, who was apparently uninjured, drove away and left Mr. Coffey who was shaken and injured. I do not find that behavior indicative of someone who had entered into a fight only in self-defense.

The facts presented here are far different from those present in Williams v. United States Postal Service, 5 MSPB 88 (1981). there, a finding of self-defense was made where an employee pushed another employee who had struck him more than once. Based on the reasons noted above which tend to

support Mr. Coffey's version of the facts, I am resolving the credibility question as to who instigated the fight in favor of Mr. Coffey. Accordingly, I find that appellant initiated the violent contact. Based on the foregoing reasons, I find that the agency's charge of striking and inflicting bodily injury upon a fellow employee is supported by a preponderance of the evidence and accordingly sustain that charge. 5 U.S.C. § 7701 (c)(1)(B). Although appellant entered into the fight because he felt he was erroneously charged with AWOL and I have not sustained the AWOL charge, such a fact does not excuse appellant's conduct. Striking a supervisor is not an appropriate method of dispute resolution.

In evaluating appellant's claim of reprisal, I note that the Board considers such a claim to be an affirmative defense to the agency's action. A claim of reprisal for filing grievances or other legitimate union activities constitutes an allegation of a prohibited personnel practice under 5 U.S.C. § 2302(b)(9). Gerlach v. Federal Trade Commission, 8

MSPB 599 (1981); Bodinus v. Department of the Treasury, 7 MSPB 385-86 (1981). Even if any agency action is otherwise supportable, it cannot be sustained if it was based upon a prohibited personnel practice such as reprisal for union activity. 5 U.S.C. §§ 7701 (c)(2)(B) and 2302(b)(9); 5 C.F.R. 1201.56(b). To the prohibited personnel practice of reprisal for union activity in violation of 5 U.S.C. 3202 (b)(9), the burden is on the appellant to establish, by a preponderance of the evidence, that he engaged in an activity protected by that section that the he subsequently was treated in an adverse fashion by the agency, and that the proposing and/or deciding official had actual or constructive knowledge that the employee was engaged in the protected activity. The appellant must also demonstrate that there is a causal connection between the protected activity and the adverse action and that the protected activity was the motivating factor in the taking of the adverse action. Gerlack, 8 MSPB at 601; Bodinus, 7 MSPB at 387.

Here, appellant established that he had previously filed grievances and thus engaged in a protected activity. He also established that his grievances occurred prior to his proposed termination. It is not clear, however, that C.L. Brown, the proposing official or Howard Boatman, the deciding official, had knowledge of the prior protected activity. Moreover, I do not find that there was a causal connection between grievances appellant filed in 1978 and 1979 and the adverse action which was proposed in 1982. The grievances are too remote in time to be considered the reason for the removal. Although appellant also made a complaint the week fore the incident, nothing indicates any relation of that complaint to the adverse action. In addition, it is not clear that such a verbal complaint constituted protected activity. Moreover, the record overwhelmingly indicates that the primary reason for the agency's charge was striking another employee, which I find to be sustained. Although I have found that the AWOL charge was not sustained, that fact does not compel a finding that reprisal for union

any handicapping condition of appellant, however, but noted appellant had mentioned previously that he was receiving counseling.

Appellant had alleged in his petition that he had been going to a psychiatrist on a regular basis and that is why he was terminated. He has not, however, offered any proof to support that allegation. He has not shown that he was suffering from a handicapping condition at the time the action occurred or what effect his having had counseling may have had in the decision to remove him. See 29 C.F.R. § 1632.702(f). Thus, appellant has not shown that the agency's action was "based on" handicap discrimination. 5 U.S.C. § 7701(c)(2)(B). Accordingly, I find his claim of handicap discrimination to be without merit.

There are some circumstances where the nexus between the adverse action and the efficiency of the services is apparent based on the employee's conduct. And , it is difficult to imagine a more

disruptive effect on the efficiency of the service than that cause by striking and injuring another employee. The question of the nexus between fighting and the efficiency of the service was discussed by the Board in Grandison v. Department of the Navy, 7 MSPB 194 (1981). In that decision, the Board noted that the agency has an obligation to provide a safe and secure work site during duty hours. Based on that fact, the Board found that appellant's conduct was serious and had a direct effect on the efficiency of the service. Although here the fighting was technically not "on duty" it occurred on the work site parking lot at approximately 3:30 p.m. Moreover, it involved striking and injuring a supervisor regarding a disagreement over a decision made about a work-related matter. I also note that appellant was employed at a power plant where dangerous equipment was used. It is particularly important in such circumstances for employees to be able to work together and not engage in such disruptive activity. Based on the foregoing reasons, I find that the agency has shown the requisite nexus.

The Board will modify an agency's imposed penalty only when it finds that the agency's judgment clearly exceeded the limits of reasonableness. Douglas v. Veterans Administration, 5 MSPB 313 (1981). One factor considered in this case is appellant's prior disciplinary records. Under Douglas it is appropriate to consider such a factor. In this case, appellant received a reprimand on October 19, 1982, for eight hours of AWOL on September 24, 1982.

The Board has stated it will limit its review of a past disciplinary record to the record itself when, at the time the past conduct occurred, t(1) the employee was informed of the action in writing; (2) he was given an opportunity to dispute the action by having it reviewed by an authority difference from the one taking it; and (3) the action was made a matter of record. Bolling v. Department of the Air Force, 8 MSPB 658 (1981). In this case, the record demonstrates that those criteria were met. The appellant did not clearly state a challenge to the

past record. Even if he had, my review, which is limited to the record itself, indicates that the agency's decisions regarding the reprimand was note "clearly erroneous." Thus, I find that the agency acted properly in considering the reprimand in order to determine the appropriate penalty. See Burnette v. U.S. Postal Service, 10 MSPB 760 (1982).

In reviewing the penalty, I note that the Board has previously found that removal may be appropriate for striking another employee. Johnson v. Department of the Air Force, 9 MSPB 625 (1982). Here, based on the facts surrounding appellant's behavior immediately prior to the incident, I find that appellant's attack was premeditated. I also note that Mr. Coffey received injuries, although they were minor. In addition, the Board has previously affirmed the penalty of removal for striking a supervisor. Nordell v. Department of Health and Human Services, MSPB Dkt. No. DC07528110557 (Apr. 13, 1983); Harris v. Department of the Treasury, 9 MSPB 821 (1982). Moreover, in Nordell the facts were far less fla-

grant than presented here. There, the employee merely struck her supervisor in the face with some papers after receiving a negative redetermination decision on a within-grade increase. Thus, even though I have only sustained the charge of striking and injuring another employee and did not sustain the AWOL charge, the former charge is sufficient to support appellant's removal. Accordingly, I find the penalty of removal here to be proper. Appellant also complained that no action was taken against Mr. Coffey regarding the fight. In light of my findings that appellant initiated the fighting and Mr. Coffey was the victim, I do not consider such a fact to constitute evidence of disparate treatment.

I find that based on (1) the sustained charge, (2) the nexus between the appellant's conduct and its effect on the efficiency of the service, and (3) the reasonableness of the penalty, this removal was for such cause as will promote the efficiency of the service.

DECISION

The action taken by the agency in removing the appellant is hereby AFFIRMED.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on August 15, 1984 unless a petition for review is filed with the Board or the Board reopens the case on its motion.

Any part to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rules, or regulation under the jurisdiction of the OPM. The Board may grant a petition for review, aft providing an opportunity for response by other

parties, when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review must be filed with the Secretary of the Merit System Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, on later than the date shown above.

The appellant has the right to petition the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E. Street, N.W.. Washington, D.C. 20507, to consider the Board's final decision on the issue of discrimination. The appellant also has the

right to file a civil action under the antidiscrimination laws in any appropriate United States district court. Either a petition or a civil action may be filed, but not both, no later than 30 days after the Board decision become final. Appellants who choose to file an action in a district court also have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs or security be waived.

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review by filing a petition with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the court within 30 days of the final Board decision. 5 US.C. § 7703(b)(1).

For the Board:

Jessica L. Parks

Presiding Official